Supreme Court, U.S.
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No. 95-1228 (6)

In The

Supreme Court of the United States

October Term, 1995

UNITED STATES OF AMERICA,

Petitioner,

vs.

JERRY E. WELLS AND KENNETH R. STEELE,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF *AMICUS CURIAE* THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

I.

Section 1014 of Title 18 imposes criminal penalties on a person who "knowingly makes any false statement or report * * * for the purpose of influencing in any way the action," *inter alia*, of a federally insured bank. The question presented is whether the materiality of the false statement or report is an element of the offense described by Section 1014.

II.

If the materiality of a false statement is *not* an element of 18 U.S.C. § 1014, but rather the evidentiary foundation for the element of "purpose of influencing," is a new trial required where, at the government's request, the district court tells the jury that materiality is an element of the offense, defines materiality, and decides as a matter of law that the statement is material?

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BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers (NACDL) is a District of Columbia non-profit corporation with a membership of more than 8,700 attorneys

[1] The parties have consented to the filing of this Brief. Their letters of consent have been filed with the Clerk.

and 28,000 affiliate members, including representatives from all fifty states. The American Bar Association recognizes the NACDL as an affiliate organization and awards it full representation in the House of Delegates.

The NACDL was founded in 1958 to promote study and research in the field of criminal defense law; to disseminate and advance knowledge of the law in the area of criminal practice; and to encourage integrity, independence and expertise of defense lawyers. Among the NACDL's stated objectives is the promotion of the proper administration of justice. Thus, the members of the NACDL have a vital interest in insuring that the integrity of the federal and state systems of criminal justice are protected. This includes an interest in this case dealing with the construction of a federal criminal statute and the jury instructions pertaining to the offense.

SUMMARY OF THE ARGUMENT

The NACDL supports respondents arguments, and the Eighth Circuit's decision below, which held that a conviction under 18 U.S.C. § 1014 requires proof of a false statement of a *material* fact, and, that under *United States v. Gaudin*, 515 U.S. ___ (1995), the trial court's determination of "materiality" as a matter of law violates the Sixth Amendment and requires a new trial. In addition, the NACDL offers an independent reason for a new trial, even if the Government prevails in its new-found view that materiality is not an element of 18 U.S.C. § 1014.

If the materiality of a false statement is not an

element of 18 U.S.C. § 1014, the judicial determination that the defendants' statements were material as a matter of law (i.e., "capable of influencing" the bank), improperly and prejudicially influenced the jury on the element of intent ("purpose of influencing" the bank). The Government's arguments, in trying to establish that materiality is not an element of the crime, make our point.

The Government acknowledges that the defendant's intent to influence the bank "will usually be established as an inference from the actual materiality of the false statement itself." Government Br. 10. Clearly, under the Government's construct, the two concepts -- purpose of influencing and materiality of the statements -- are inextricably intertwined. Thus, where the judge has concluded and announced that a defendant's statements are material, the jury's essential function to decide the "purpose of influencing" element of the crime is fatally compromised. The judicial conclusion that the statements are material, under the Government's view that proof of materiality leads inexorably to proof of intent, violates both *Gaudin* and the line of precedents forbidding irrebuttable, conclusive presumptions in the criminal law. The trial judge's determination of materiality should not be allowed to supply the foundation for the jury's inferences about proof of an element of the crime.

ARGUMENT

SINCE THE "PURPOSE OF INFLUENCING" ELEMENT OF 18 U.S.C. § 1014 IS USUALLY PROVEN BY AN INFERENCE FROM THE MATERIALITY OF THE STATEMENTS (GOVT. BR. 10), THE CONCLUSION THAT THE STATEMENTS WERE MATERIAL AS A MATTER OF LAW COMPROMISED THE JURY'S FUNCTION TO DETERMINE "PURPOSE OF INFLUENCING" AND REQUIRES A NEW TRIAL

The Government charged respondents with making "false statements of material fact" (JA 30-33), referred below to "the materiality elemen[t]" of § 1014 (JA 55), argued that the evidence proved materiality (JA 50, 59-60), and requested and obtained an instruction defining materiality and that materiality was established as a matter of law (JA 36, 42-43). Only after this Court decided *United States v. Gaudin*, 515 U.S. ___ (1995) (essential element of the materiality of a false statement under 18 U.S.C. § 1001 must be submitted to the jury), did the Government take a different tack, arguing then to the Eighth Circuit that there can be no *Gaudin* error in an 18 U.S.C. § 1014 conviction because "materiality" is not an essential element of that crime (JA 62). In this Court, the Government has advanced two reasons in support of that argument.

First, the text of the statute does not make materiality an element. That we cannot dispute, although it does not end the inquiry. *See* Respondents' Brief. Second, the Government says that there is no reason to impute materiality as an element of section 1014 because . . .

> a similar purpose is already served by Section 1014's distinctive intent requirement, which requires prosecutors to establish not only that the defendant knowingly made the false statement but that the defendant made the false statement "for the purpose of influencing in any way the actions" of a covered financial institution. 18 U.S.C. 1014.

Government Br. 21. It is that second argument -- that materiality and § 1014's "distinctive intent requirement" have a "similar purpose" and are in fact interrelated -- which leads to the conclusion that the instructions in this case require a new trial even if materiality is not an element of § 1014.

The Government repeatedly stresses the similarity and relatedness between "materiality" and "purpose of influencing":

> As numerous courts have recognized, *a defendant's intent to influence a bank's actions will usually be established as an inference from the actual materiality of the false statement itself.*

Government Br. 10 (emphasis supplied). The Government

distinguishes other statutes with an explicit materiality requirement, saying they do not contain:

> . . . the distinctive intent requirement of Section 1014, which as we have discussed, largely serves the purpose of a materiality requirement in limiting the scope of conduct rendered criminal under the statute.

Government Br. 24. The symmetry between "materiality" and "intent to influence" is, according to the Government, confirmed by the cases:

> First, a similar purpose is already served by Section 1014's distinctive intent requirement . . . *See United States v. Lopez*, 71 F.3d 954, 961 (1st Cir. 1995) (proof of the requisite "purpose of influencing" will usually require an inference from proof of actual materiality. . . .; *see also Staniforth [United States v.]* 971 F.2d [1355], 1357-1358 [7th Cir. 1992] ("the less material the statement was, the less likely it was to have been made for the

> purpose of influencing the bank"). There is no reason to conclude that Congress intended an additional implicit materiality requirement to serve the *same purpose* of limiting the coverage of the statute.

Government Br. at 21-22 (emphasis supplied). *Lopez*, cited in the above paragraph, confirms that materiality mirrors "purpose of influencing":

> In theory, the question of purpose (the defendant's specific intent) differs from the question of materiality (whether an objective lender would be likely to be influenced by the statement). Purpose could exist without materiality, and vice versa. *But in most cases, no independent proof exists of a defendant's specific intent*; rather, the jury infers such purpose from the fact that the statement would so influence an ordinary lender.

United States v. Lopez, 71 F.3d 954, 960-961 (1st Cir. 1995) petition for cert. pending, Nos. 95-1745 and 95-8569

(emphasis supplied).

We believe that the view of all the circuits, save one -- that materiality is an essential element of § 1014 -- is correct. Therefore we concur in the respondents' argument that the Eighth Circuit should be affirmed on that ground.[2] But if all of those courts of appeal have erred, then the conviction below must still be reversed because the jury in this case was instructed that the defendants were charged with conspiring to make "false statements of material facts" (JA 38); that an "essential element" of the conspiracy to violate § 1014 was "withholding and concealing information of material fact for the purpose of influencing the action of the financial institution" (JA 39); that "the elements of making a false statement to a bank are . . . with[holding] information of material fact from the bank" (JA 41); and that:

> A statement or representation is "false" when it is untrue when made or effectively conceals a material fact. A material fact is a fact that would be important to a

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[2] The Government relies, *inter alia*, on *Kay v. United States*, 303 U.S. 1 (1938), and *Williams v. United States*, 458 U.S. 279 (1982), to suggest that this Court has already rejected materiality as an element of § 1014. Neither case carries the weight assigned to it by the Government. *Kay* is not a § 1014 case, and it stands only for the proposition that in a false statement to the Home Owners Loan Corporation "actual damage is not an ingredient of the offense." 303 U.S. at 6. *Williams* was a bad check § 1014 case which did not present the issue of whether materiality is a required element of the Government's proof.

> reasonable person in deciding whether to engage or not to engage in a particular transaction.

JA 42. The trial judge "determined as a matter of law that the statements were material and instructed the jury that they were not to deliberate on the issue of materiality." *United States v. Wells*, 63 F.3d 745, 749 (8th Cir. 1995). *See* JA 43.[3]

Thus, by telling the jury that § 1014 (and conspiracy to violate § 1014) proscribe and criminalize "material" false statements, defining materiality -- "a fact that would be important to a reasonable person in deciding whether to engage or not engage in a particular transaction" -- and by deciding that the defendants' statements or omissions were so material that the jury need not consider the issue, the trial court completely compromised the jury's function.

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[3] This case is not unique in that regard. Pattern jury instructions of the circuit courts of appeal for 18 U.S.C. § 1014 refer to false statements of "material" fact and define a "material" fact for the jury. *See e.g.*, Pattern Jury Instructions No. 31, Criminal Cases, U.S. Eleventh Circuit District Judges Association (1985 ed.). Prior to *Gaudin*, judges in all circuits which have found materiality to be an element of § 1014 would have decided that element as a matter of law, and so instructed the jury. *See e.g.*, *United States v. Nash*, 76 F.3d 282, 285 (9th Cir. 1996) (the trial court said, "false statements of income and assets are material for purposes of these instructions."); *United States v. Ross*, 77 F.3d 1525, 1538 (7th Cir. 1996) (the trial court "determined itself that the statements charged were 'material' and instructed the jury to consider the element of materiality to be established as a matter of law").

In its attempt to explain why this Court should reject materiality in the future as an element of § 1014, the Government makes an argument which supports the conclusion that in this case (and any other case in which a jury has been told that materiality is an element of the crime and the judge has found it to be present) the judicial determination of materiality requires reversal:

> Conditioning a conviction on the jury's having found the existence of an element extraneous to the text of a statute heightens the chances that, solely as a result of speculation or confusion regarding that extra element, a jury will not return a verdict of guilty that it otherwise regards as warranted.

Government Br. 25. But where a jury *has been told* that the "extraneous" element is essential to a conviction, and the judge has found it to be present, the chance that the jury will return a guilty verdict is at its zenith. That is especially so when the "extraneous" element of materiality is nearly synonymous with the "purpose of influencing" element. The Government's submission cements the point:

> The addition of a materiality element in cases brought under Section 1014 poses a particular risk of such

> speculation or confusion, because jurors will often have had personal experiences with financial and credit institutions. Despite a legal standard that focuses inquiry on whether the false statement had "a natural tendency to influence" a decision of a financial institution, *Gaudin*, 115 S. Ct. at 2313, jurors may be inclined improperly to inquire, based on their own experiences, whether the bank's action on the particular loan application or other submission at issue, would in fact have been any different absent the falsehood.

Government Br. 25. This Court does not have to speculate on the effect upon a jury which has been told that the statement prompting the charged offense was, as a matter of law, important to the bank, and would be "important to a reasonable person in deciding whether to engage or not engage in a particular transaction." Having been so instructed, jurors need not (indeed cannot) reflect on their own experiences. The answer to the "purpose of influencing" element has been made clear to them. If, as the Government concedes, "a defendant's intent to influence a bank's actions will usually be established as an inference from the actual materiality of the false statement itself" (Government Br. 10), then the trial court determination of

materiality has resulted in a directed verdict on the "purpose" element.

Even the Government's reliance on *Kungys v. United States*, 485 U.S. 759 (1988) (false representation for the purpose of obtaining immigration benefits need not be material) aids our argument. The Court recognized the strong relationship between materiality and intent to influence:

> Obviously it will be relatively rare that the Government will be able to prove that a misrepresentation that does not have the natural tendency to influence the decision regarding immigration or naturalization benefits was nonetheless made with the subjective intent of obtaining those benefits. This is especially so since the invalidating intent . . . must be proved by "clear, unequivocal, and convincing evidence which does not leave the issue in doubt."

485 U.S. at 780-781 (citations omitted).

Thus, either way the Government loses. If materiality is an essential element of § 1014, then *Gaudin* requires it to be left to the jury. If materiality is not an essential element, then telling the jury that it was, and that the trial court had found it to be proven, so tainted the

"purpose" inquiry that a new trial is required. This Court's comments in *Bollenbach v. United States*, 326 U.S. 607, 612 (1946), are apt:

> "In a trial by jury in a federal court, the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and determining questions of law." *Quercia v. United States*, 289 U.S. 466, 469 "The influence of the trial judge on the jury is necessarily and properly of great weight," *Starr v. United States*, 153 U.S. 614, 626, and jurors are ever watchful of the words that fall from him.

In a § 1014 case in which the judge has told the jury that a statement is material, even though materiality is not an element of the crime (assuming, *arguendo*, that materiality is not an element of § 1014), an attentive jury will pay heed to those words. The error in such an instruction is analogous to giving the jury an irrebuttable presumption as to an element of a crime. *See Carella v. California*, 491 U.S. 263, 265 (1989) (per curiam) (instructions relieving the States of the burden to prove each element beyond a reasonable doubt "subvert the presumption of innocence accorded to accused persons and also invade the truth-finding task assigned solely to juries in criminal cases."); *Gaudin*, 515 U.S. at __, 115 S.Ct. 2310.

CONCLUSION

For the foregoing reasons, the decision of the Eighth Circuit Court of Appeals ordering a retrial on respondents' convictions should be affirmed.

Respectfully submitted

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